85-1068

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

JOHN DEMJANJUK,
Petitioner,

vs.

JOSEPH PETROVSKY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. The Extradition Court Erroneously Asserted Subject-Matter Jurisdiction in the Extradition Proceedings Against Petitioner When Under 18 U.S.C. Section 3184 It Was Incompetent to Consider the Subject-Matter Extraterritorial Acts (Offenses Alleged) As Charged Under Israel's Municipal Nazi and Nazi Collaborators (Punishment) Law of 1950, Thereby Unlawfully Restraining Petitioner of His Liberty, Which Unlawful Restraint the District and Circuit Courts Failed to Remedy on Habeas Corpus Review. When:

(A) Congress Has Vested Subject-Matter Jurisdiction Over "War Crimes" Exclusively in the Military Courts and

(B) The Issue of Subject-Matter Jurisdiction Over Genocidal Acts by United States Civilian Courts Remains an Undecided Political Question in the United States.

II. Whether the District Court Erred in Finding That the Offenses Alleged in the Request for Extradition Were Among Those Mentioned in Article II of the United States-Israel Convention on Extradition.

III. Whether the District Court Erred in Finding That the Offenses Charged by Israel Were Extraditable Under Article III of the United States Convention on Extradition Provided the U.S. Secretary of State Exercised His Discretion to Do So.

IV. Whether the District Court Ruled in Error That There Was Evidence Sufficient to Establish the Identity of "Ivan Grozny" and to Establish Probable Cause for the Commission of the Alleged War Crimes and Genocidal Act in Israel's Complaint by the Petitioner-Appellant.

PARTIES TO THE PROCEEDINGS

1. John Demjanjuk
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2. Joseph Petrovsky, Warden
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3. Edwin Meese
   United States Attorney General
   Washington, D.C.

4. George Schultz
   Secretary of State
   Washington, D.C.

5. United States District Court
   Northern District of Ohio
   Cleveland, Ohio

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These Opinions are reproduced in the Appendix.

GROUNDS FOR SUPREME COURT JURISDICTION

Jurisdiction of the United States Supreme Court is invoked under the following facts: This case originated as an international extradition in the District Court for the Northern District of Ohio, which Court found petitioner extraditable under 18 U.S.C. § 3184. On April 15, 1985, a petition for writ of habeas corpus under 28 U.S.C. § 2144 was timely filed before that Court and denied on May 18, 1985. An appeal from this denial was taken to the Sixth Circuit Court of Appeals on June 4, 1985. The Sixth Circuit affirmed the Courts below on October 31, 1985. This petition is filed within 90 days of that date. This Court's particular jurisdiction to review the Sixth Circuit Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1), which allows for review of Federal "cases in the courts of appeal."

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3184:

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign govenment, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

18 U.S.C. § 3190:

§ 3190. Evidence on hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any

extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

United States-Israel Convention on Extradition, 14 U.S.T. 1707 (1963):

(Reproduced in Appendix)

Art. I, § 8, cl. 10, United States Constitution:

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

STATEMENT OF THE CASE

On October 18, 1983, the Magistrate's Court in Jerusalem, Israel issued an arrest warrant for John Demjanjuk on charges under paragraphs 1-4 of Israel's Nazi and Nazi Collaborator's (Punishment) Law 5710-1950, based on an Israeli National Police request for warrant made the previous day. The witness statements accusing petitioner identified him only as "Ivan Grozny" of the Death Camp Treblinka, Poland. On November 18, 1983, the United States Attorney for the Northern District of Ohio, acting on behalf of the State of Israel, filed a Complaint for Extradition in the District Court, containing a certification from Jeffrey H. Smith, United States Department of State, that the charges were within the United States-Israel Extradition Convention, 14 U.S.T. 1707 (1963).

The District Court, per Chief Judge Battisti, requested the International Human Rights Law Group, David Carliner, Director, to act as *amicus curiae*. After filing of numerous briefs, including defense motions for recusal based on Judge Battisti's prior conduct in the case, a final hearing was held on March 15, 1985. On April 15, 1985, Judge Battisti certified petitioner extraditable. On April 25, 1985, a petition for writ of *habeas corpus* was filed, and subsequently denied on May 17, 1985. On June 3, 1985, an appeal from this ruling was filed in the Sixth Circuit, which by opinion of October 31, 1985, affirmed the District Court.

Petitioner here seeks certiorari in this Court to review the issues raised below and the decisions of the extradition and *habeas corpus* Court below.

ARGUMENT

I. The Extradition Court Erroneously Asserted Subject-Matter Jurisdiction in the Extradition Proceedings Against Petitioner When Under 18 U.S.C. Section 3184 It Was Incompetent to Consider the Subject-Matter Extraterritorial Acts (Offenses Alleged) As Charged Under Israel's Municipal Nazi and Nazi Collaborators (Punishment) Law of 1950, Thereby Unlawfully Restraining Petitioner of His Liberty, Which Unlawful Restraint the District and Circuit Courts Failed to Remedy on Habeas Corpus Review. When:

(A) Congress Has Vested Subject-Matter Jurisdiction Over "War Crimes" Exclusively in the Military Courts and

(B) The Issue of Subject-Matter Jurisdiction Over Genocidal Acts by United States Civilian Courts Remains an Undecided Political Question in the United States.

Petitioner is restrained of his liberty pending *habeas corpus* review of the extradition magistrate's determination that he is extraditable to Israel to face charges under Section 1-4 of Israel's Nazi and Nazi Collaborator (Punishment) Law of 1950 (hereinafter the Nazi (Punishment) Law of 1950). The charges set forth in the Nazi (Punishment) Law of 1950, reproduced in the Appendix, include war crimes, crimes against humanity, crimes against the Jewish people (Section 1), crimes against persecuted persons (Sections 2 and 4) and membership or affiliation with an enemy organization during the Nazi regime (Section 3). The United States-Israel Extradition Treaty of 1963, 14

U.S.T. 1707 (hereinafter the Convention on Extradition) reproduced in the Appendix at A142, does not list any of these crimes among its extraditable offenses, while 18 U.S.C. section 3184, the United States Code provision effectuating our extradition treaties with other sovereigns, states that a charge must be sustained under the terms of the applicable treaty before a certificate of extraditability may issue. Petitioner here states that he nowhere questions the State of Israel's sovereign capacity to legislate its municipal law. His arguments, rather, address themselves to the competency of a United States extradition magistrate to find Petitioner Demjanjuk extraditable on the Israeli charges.

The extradition magistrate, once presented with the United States Attorney's complaint, had to address whether the charges in the Israeli Warrant described offenses for which extradition may lie, 18 U.S. Section 3184, *Shapiro v. Ferrandina,* 478 F.2d 894, 907-908 (2d Cir., 1973), *Gallina v. Fraser,* 278 F.2d 77, 78 (2d Cir., 1960), *Branch v. Raiche,* 618 F.2d 843, 848 (2d Cir., 1980), *Factor v. Loubenheiner,* 290 U.S. 276, 298 (1933), *Collins v. Loisel,* 259 U.S. 309, 314 (1922). The Israeli Warrant charged Petitioner with offenses against its Nazi (Punishment) Law of 1950. Before he could reach the issue of extraditability, the extradition magistrate had to determine whether he had subject-matter jurisdiction over the acts alleged.

A. Congress has vested jurisdiction over "war crimes" exclusively in the military courts

Petitioner will first address the "war crimes" charge. Magistrate Brown in deciding *The Matter of the Extradition of Andrija Artukovic,* CV 84-8743-R (D.C.C.D. Cal., March 5, 1985) rejected war crimes as a basis for Artukovic's extradition to Yugoslavia, ordering the United States

Attorney to obtain a Yugoslavian charging document alleging murder against the respondent in order to sustain the extradition action, slip op. at 16. Similarly, the court deciding *In Re The Extradition of Ryan,* 360 F. Supp. 270 (E.D. N.Y., 1973), *aff'd* 478 F.2d 1397 (2d Cir., 1973), found Mrs. Ryan extraditable on the West German charges of multiple acts of murder, arising from her conduct as a warden of the Lublin concentration camp. West Germany never attempted extradition on the basis of war crimes, since it had, while part of the Third Reich, territorial jurisdiction over Lublin, Poland.

In the case at bar, the extradition magistrate's inability to adjudicate war crimes is brought into sharp relief by Israel's claim of extraterritorial jurisdiction. The Nazi (Punishment) Law of 1950, Sections 2, 4(a). Israel has not charged Petitioner with acts that may be either common-law felonies or war crimes, but only war crimes, and derives any jurisdiction it may have from the acts' character as war crimes. Thus, subject-matter jurisdiction here is an all or nothing proposition—either Petitioner should have been tried criminally for war crimes here years ago, or Israel cannot extradite him on such charges. *In Re Yamashita,* 327 U.S. 1, 10 (1946).

To try those accused of war crimes committed in Europe during World War II, the Allied Powers executed the London Agreement of August 8, 1945, XV Trials of War Criminals at 8, 9 (1949) 59 U.S. Stat. 1544. This document was an agreement between the governments of the United States, France, Great Britain and the Soviet Union to establish an International Military Tribunal (IMT).

Part of this agreement was the Charter of the IMT, XV Trial of War Criminals, 10, 59 U.S. Stat. 1546, which

in Article 6 defined crimes against the peace, or initiation of wars of aggression; war crimes, or violations of the laws or customs of war; and crimes against humanity, or persecution on political, racial or religious grounds. XV Trials of War Criminals at 11.

The predicate to the London Agreement was the Moscow Declaration (1943) 1 Trials of War Criminals, which stated in part:

> "those . . . men and members of the Nazi party who . . . have taken a consenting part in . . . atrocities, massacres and executions *will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries*". (*emphasis supplied.*)

This provision was carried forward into the IMT Charter's Articles 10 and 11, which provided that "the *competent* national authority of any Signatory—may (charge) any person convicted by the tribunal, with a crime other than membership in a criminal organization and any such court may . . . impose punishment independent and additional. . . ." The competent national authority in the United States for the trial of war crimes are the military courts, only, *In Re Yamashita, supra,* syllabus 2(b), 327 U.S. at 13.

Thus, in the United States, only a military court has competent subject-matter jurisdiction over war crimes, *In Re Yamashita, supra; Ex Parte Quirin,* 317 U.S. 1 (1943), because Congress under Article I, Section 8, Cl. 10 United States Constitution vested military courts with exclusive competence, *Yamashita, supra* at 7. The IMT, created by the agreement of the Allied sovereigns, authorized by its charter the competent national authorities to

try Nazi war criminals after the IMT had done its work. The competent authority in the United States is the military courts authorized by Congress. Control Council Law No. 10, December 20, 1945, Official Gazette of the Control Council for Germany, No. 3, at 50, reprinted in 15 Dep't St. Bull. 862 (1946).

The Treaty governing the extradition at bar states that the grant or refusal of extradition:

> "shall be made *in accordance with the domestic law of the requested party*", Article IX. (*emphasis supplied.*)

The domestic law of the requested state, the United States, vests exclusive subject-matter jurisdiction over war crimes in the military courts. Hence, a civilian extradition magistrate cannot exercise any jurisdiction over a war crimes charge. In the one case where a like extradition was requested, that charge was turned aside, *Artukovic, supra* at 16. Under 18 U.S.C. Section 3184, the magistrate must act in conformity with the Treaty. The Treaty and our national law preclude the extradition magistrate's exercise of subject-matter jurisdiction over war crimes.

B. The procedural issue of subject-matter jurisdiction over genocidal acts remains an undecided political question in the United States

Petitioner will now address the genocidal acts charge. The United States recognizes international law as part of United States law, Article I, Section 8, Cl. 10, *The Paquete Habana,* 175 U.S. 667 (1900), *The Scotia,* ..... U.S. (14 Wall.) 170, *United States v. Smith,* ..... U.S. ..... (1820), *Filartiga v. Pena-Irala,* 630 F.2d 737 (2d Cir., 1980), *Tel-Oren v. Libyan Arab Republic,* 727 F.2d 774 (D.C.C., 1984). The issue presented in this case is whether the genocidal

acts of which petitioner-appellant is charged are crimes of an international character and, if so can an extradition magistrate take subject-matter jurisdiction over these charges absent a Congressional mandate to do so. As outlined above, the IMT Charter created a very specific authority to try and punish Nazi war criminals, among those crimes included genocidal acts. The IMT tried these criminals under the mandate of an international agreement between sovereigns, *cf.* London Agreement, *supra.*

In addressing this issue, a Court must look to our law of foreign relations for subject-matter jurisdiction. Petitioner-appellant will demonstrate that our law cannot reasonably provide an extradition magistrate with subject-matter jurisdiction over charges of genocidal acts against petitioner. The first source to which an extradition magistrate must look in ascertaining the existence of subject-matter jurisdiction is the law "of the place where the person brought shall be found," Article V, Treaty, 14 U.S.T. at 1710. As reflected in the Israeli warrant of arrest, that place was Ohio. Ohio law does not provide for subject-matter jurisdiction over genocidal acts among any of its laws. Hence, under Ohio law and, therefore, under Article V of the treaty, the extradition magistrate lacked subject-matter jurisdiction over the changes, *Shapiro v. Ferrandina,* 478 F.2d 894, 901 (2d Cir., 1973). Subject-matter jurisdiction must be determined by the Treaty's terms, *Gallina v. Fraser,* 278 F.2d 77, 79 (2d Cir., 1960), *Factor v. Laubenheimer, supra,* 290 U.S. at 300 (1933). Thus, under the first rough assessment of subject-matter jurisdiction, the extradition magistrate lacked jurisdiction, *Collins v. Loisel,* 259 U.S. 309, 314 (1922).

Since there is no Ohio law prohibiting genocidal acts that asserts the extraterritorial jurisdiction in a fashion

paralleling that of Israel's law, the extradition magistrate may next look to federal law, since, that law applies in Ohio, *Branch v. Raiche*, 618 F.2d 843, 848-850 (1st Cir., 1980), *Cucuzzella v. Kelikoa*, 638 F.2d 105, 107-108 (9th Cir., 1980).

Looking to federal law, the extradition magistrate could find only that the United States will prosecute for a federal offense if a "detrimental effect" occurred within the United States, *Matter of Marc Rich & Cop., A.G.*, 707 F.2d 663, 666 (2d Cir., 1983) either to the government itself or to individuals within the United States, *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D. N.Y., 1980), citing *Strassheim v. Milton Daily*, 221 U.S. 280, 282 (1911), *United States v. Postal*, 589 F.2d 862, 865 (5th Cir., 1979), *United States v. Bowman*, ... U.S. 94 (1922). Where this adverse effects test has not been satisfied, the so-called "objective territorial" test, subject-matter jurisdiction over the alleged offense has been rejected and the accused discharged, *Yenkichi Ito v. United States v. James Robinson*, 515 F. Supp. 1340 (S.D. Fla., 1981). The extra-territorial genocidal acts with which petitioner-appellant is charged by Israel under its Nazi (Punishment) Law of 1950, therefore, cannot comport with the United States' objective territorial scope of jurisdiction, since Israel's law does not require any effect within Israel or on Israeli citizens. Under this analysis, which proceeds from standing United States precedent, the extradition magistrate lacked subject-matter jurisdiction of the alleged genocidal acts.

This being the case, under 18 U.S.C. Section 3184, the extradition magistrate must then look to United States foreign relations law to determine if subject-matter jurisdiction lies, this is so because 18 U.S.C. Section 3184, as

much as 28 U.S.C. Section 1350, *Tel-Oren v. Libyan Arab Republic, supra,* effectuates our foreign relations law within the United States. Critically our foreign relations with respect to extraditions are defined by Treaty, 18 U.S.C. Section 3184. Hence, the extradition magistrate must first look to any treaties that may inform his decision under 18 U.S.C. Section 3184. The Treaty that has most bearing on his statutory decision is our Extradition Treaty with the State of Israel, 14 U.S.T. 1707 (1963). Nowhere in that treaty are extraterritorial genocidal acts enumerated among the extraditable offenses. The United States Senate ratified the treaty in 1963 and it was entered into force in December, 1963. The ratification was made pursuant to Article XIX of the treaty, which stated that it would "enter into force upon the exchange of ratifications".

Hence, under the Treaty in force, 14 U.S.T. 1707 (1963) Article XIX, *supra,* no subject-matter jurisdiction over alleged genocidal acts could arise through the extradition magistrate's authority under 18 U.S.C. Section 3184. Looking to another treaty, the Genocide Convention of 1948, 78 United Nations Treaty series 377, which codified the international procedural law regarding genocidal acts, its terms also define when a sovereign becomes a High Contracting Party thereto in Article XI, stating that:

> "The present Convention shall be ratified, and the instruments of ratification shall be deposited with Secretary general of the United Nations."

The United States never satisfied the requirements for ratification, hence is not a High Contracting Party to the Convention. However, the Convention remains in force among the sovereigns that have ratified it. The United States is not such a sovereign, so has never pledged to

extradite those accused of genocidal acts, Article VII, Genocide Convention.

Absent ratification, the extradition magistrate may not consider the Convention's terms in determining his subject-matter jurisdiction over genocidal acts, 18 U.S.C. Section 3184. Because there exists a treaty that provides the procedure for adjudication of the subject-matter of genocidal acts, to which the United States is not a party, the extradition magistrate has no authority to look to the customary law of nations for the definition or procedure regarding this subject matter, 18 U.S.C. Section 3184, *Paquete Habana, supra, The Scotia,* ..... U.S. (14 Wall.) 170 (1871), since the United States' procedural treatment of genocidal-acts subject-matter remains a political question that is within the sole purview of the Executive and Legislative Branches of Government, *Colegrove v. Green,* 328 U.S. 549, 553-554 (1964), *Baker v. Carr,* 369 U.S. 186, 203 (1962).

The essential error of the extradition court in asserting jurisdiction over these genocidal acts is that he has taken jurisdiction over an "international crime" that in the United States remains undefined by statute or any international agreement to which it is presently a party, see 18 U.S.C. 1651, 20 U.S.T. 2941 (1982). The Executive and Congress of the United States have recognized universal jurisdiction only over those international crimes that the United States Legislative and Executive have formally defined, and the Courts have decided cases with those definitional constraints, *Tel-Oren, supra.* No court before has passed on criminal conduct based on the definitions of "international crimes" provided by another sovereign's municipal state law.

In the case at bar, the extradition magistrate supported his claim that universal jurisdiction over the geno-

cidal acts of which petitioner-appellant is accused by invocation of the IMT. *In Re Demjanjuk*, 612 F. Supp. at 556-57. He ruled that the IMT trials stood for recognition of universal jurisdiction by the United States of the crimes of which petitioner-appellant is accused. *Demjanjuk, id.* The establishing documents of the IMT, the London Agreement, *supra* and the charter of the IMT, *supra*, contradict the extradition magistrate's claim, as well as that of the reviewing District and Sixth Circuit Court. The framers of the London Agreement, *supra*, and the Charter of the IMT, *supra*, codified three classes of crimes: crimes against the peace, war crimes, and crimes against humanity. *Demjanjuk, id.* at 556, n.11.

Under the establishing documents, subject-matter jurisdiction was taken on strictly *territorial* principles, since all of the lands in which the crimes occurred were under the control of one or the other the Allied Powers, signatures to the London Agreement, at the time jurisdiction was taken. Universal jurisdiction over the crimes, as *delicto jus gentium*, was never considered. The terms of these documents reinforce this when the United States assumed its obligation to return the war criminals to the states in which they committed their crimes, or try the major policy-making criminals in Germany, the most appropriate forum for their trial. Charter of the IMT, *supra*. The IMT's assertion of jurisdiction thus was grounded on traditional territorial principles, carefully defined and applied pursuant to the multilateral agreement chartering the tribunal. Their procedure was ratified by the United Nations in 1946, G.A. Res. 95, U.N. Doc. A/64/Add. 1 at 188 (1946); 5 U.N. GADR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950).

The utter misapplication of the Nuremburg precedent opened the gate for the extradition and *habeas corpus*

courts below to fashion *ad libi* jurisdiction principles over the alleged genocidal acts *ad libitum*. Such fashioning flies in the face of 18 U.S.C. Section 3184, *Collins v. Loisel, supra* and *Shapiro v. Ferrandina, supra*.

Thus, based upon the IMT authority that flatly contradicts their claim on the one hand, and a treaty that is of no force or effect in the United States, on the other, the Courts below took subject-matter jurisdiction over the genocidal acts of which petitioner-appellant is charged. This conduct by the extradition court has resulted in the unlawful restraint of petitioner-appellant's liberty. The Circuit review, despite a difference of language and author, tracked almost exactly with argument of the Extradition Court, thereby continuing that unlawful restraint.

Thus, in conclusion, the Extradition Court committed error in taking subject-matter jurisdiction over the Nazi (Punishment) Law of 1950 charges because the adjudication of war crimes is within the exclusive jurisdiction of the military courts and the procedural treatment of genocidal-acts subject-matter remains an undecided political question. In like manner, the Courts reviewing the extradition on habeas corpus erred for the same reasons to conclude that the petitioner-appellant was lawfully restrained of his liberty when, as demonstrated above, under statute, Treaty and the Constitution of his restraint was and is unlawful. . .

II. The District Court Erred in Finding That the Offenses Alleged in the Request for Extradition Were Among Those Mentioned in Article II of the United States-Israel Convention on Extradition.

After announcing that it had acquired subject-matter jurisdiction to hear evidence of the criminality of war

crimes/genocidal offenses alleged in Israel's, Request for Extradition, offenses recognized by the extradition court in its threshold ruling as "international crimes", *delicto jus gentium,* the Court then ruled that the offenses alleged were among those mentioned in Article II of the Treaty, and that these offenses were extraditable under Article III unless otherwise time barred. *In Re Demjanjuk,* 612 F. Supp. at 554-63. The Court ultimately ruling that petitioner-appellant was extraditable only for *murder. Demjanjuk, id.* at 558-63.

All parties agree that from the application of its municipal state Nazi Law arose Israel's assertion of extraterritorial criminal jurisdiction in this case. Israel clearly lacks municipal and/or international extraterritorial jurisdiction over the offense of "*inter alia,* murder" as charged in the Government's original Complaint. Because the charges contained in Israel's arrest warrant (complaint) were not within the treaty the Extradition Court ruled that the charge contained in the Government's original Complaint would be the charge for which the Government was seeking petitioner-appellant's extradition and thus the charge that would be tested against the requirements of 18 U.S.C. Section 3184 and Article II of the Treaty.

The District Court ultimately certified petitioner-appellant extraditable for the specific acts alleged by Israel which rise to the level of war crimes, crimes against humanity, crimes against the Jewish people and crimes against persecuted people. *Demjanjuk, id.* at 560-61. For purposes of expedient interpretation of Article II of the Treaty, however, the Court noted that the Government Complaint duly and legally charged the accused with crimes of "murder and malicious wounding; inflicting grievous bodily harm", all crimes which fall facially within the treaty. *Demjanjuk, id.* at 546.

It can be seen, therefore, that since the Government's Complaint does not charge petitioner-appellant with a crime committed within the jurisdiction of Israel and since the Israeli Complaint (Arrest Warrant) does not charge petitioner-appellant with an offense enumerated in Article II of the Convention on Extradition, the express requirements of 18 U.S.C. Section 3184 and the Convention have not been met. Treaty, 14 U.S.T. 1707 (1963). The District Court properly stated the rule applicable under these circumstances when it held that "if Israel lacks jurisdiction (over the crimes alleged), the United States *cannot* (*emphasis added*) extradite Respondent to Israel. *Demjanjuk, id.* at 554.

III. The District Court Erred in Finding That the Offenses Charged by Israel Were Extraditable Under Article III of the United States-Israel Convention on Extradition Provided the U.S. Secretary of State Exercised His Discretion to Do So.

The pertinent portions of Article III of the Convention on Extradition between the United States and Israel are set forth:

> When the offense has been committed outside the territorial jurisdiction of the requesting party, extradition need not be granted unless the laws of the requested party provide for the punishment of such an offense committed in similar circumstances

Having erroneously decided that the offense (*inter alia,* murder) charged in the United States Attorney's Complaint was among those offenses enumerated in Article II of the Convention on Extradition, in order to facially meet the requirements of 18 U.S.C. Section 3184, the Court then had to test this charge against the require-

ments of Article III. The alleged crimes charged having occurred in Poland, the Court found that Article III was applicable in this case. *Demjanjuk, id.* at 561.

After reviewing the provision of the Convention on Extradition, the Court ruled that the extraterritorial offenses charged by Israel were not punishable in the United States "under similar circumstances", dual criminality being absent in this case. Nonetheless, the District Court made the determination that petitioner-appellant was extraditable. Extradition in this case was found not to be mandatory, as a matter of law, but at the sole discretion of the United States Secretary of State. *Demjanjuk, id.* at 560-61.

As precedent to justify its decision to certify war crimes and genocidal offenses as extraditable crimes under United States Law, the Extradition Court relies, in part, upon precedent in the *Artukovic* case, *supra.* Upon analysis, however, the Court in *Artukovic* provides a well reasoned holding contrary to the District Court's procedural ruling which certified as "international crimes" the offenses contained in Israel's Request for Extradition.

Yugoslavia in its request for extradition, had initially charged Artukovic with war crimes. The Treaty of Extradition between the United States and Yugoslavia does not enumerate war crimes as extraditable offenses, *Artukovic, id.* at 9. Like the United States-Israel Convention on Extradition, it does incorporate the common law principle of dual criminality. Since no United States Law proscribes war crimes, the Court found Artukovic *not extraditable for war crimes. Artukovic* at *id.* Due to the Extradition Court's acknowledged lack of jurisdiction over war crimes and genocide, the government then sought Artukovic's extradition *only* on charges of common law murder, a crime enumerated in the United States-

Yugoslavian Treaty of Extradition and contemplated by United States Law, *Artukovic* at *id.* The reticence of the *Artukovic* court regarding the charge of war crimes was recently underscored when Yugoslavia refused United States' request to extradite Mohammed Abbas, the alleged mastermind of the act of piracy committed aboard the Italian cruise ship Achille Lauro, that claimed the life of United States citizen Leon Klinghoffer. Yugoslavia granted Abbas asylum despite the fact that his alleged crime is recognized by all civilized nations as criminals. Yugoslavia's jurisdictional ruling underscores the uncertainty of definition among sovereigns, in all but a very few international crimes.

The extradition of Hermine Ryan to the Federal Republic of Germany is further illustrative of U.S. policy regarding extradition for alleged war crimes, *In Re Extradition of Hermine Ryan,* 360 F. Supp. 270 (E.D. N.Y.), *aff'd,* 478 F.2d 1397 (2d Cir. 1977). Under a 1930 Treaty of Extradition, the West German Government requested the extradition of the Austrian born, naturalized U.S. citizen, Hermine Braunsteiner Ryan, for crimes committed while serving as a warden at a concentration camp in Lublin, Poland. Although suspected by the Federal Republic of Germany of war crimes, Mrs. Ryan was charged with murder under the German Penal Code, a civilian law in effect throughout the period of the National Socialist (Nazi) Regime. *Ryan, id.* at 272. Moreover, the West German Government in *Ryan* asserted jurisdiction over the alleged wartime crimes based upon the traditional principle of *territoriality* not *universality. Ryan* at *id.* The Extradition Courts in the *Ryan* and *Artukovic* cases, unlike the District Court in the instant matter, carefully avoided infringements upon Congress' exclusive power to define offenses against the laws of nations, Article I, Section 8, cl. 10, United States Constitution.

United States policy regarding recognition of post-Nuremberg criminal jurisdiction over alleged crime committed during time of war was clearly set out in a request by Italy for the extradition of U.S. Army Sergeant LoDolce. The Government of Italy charged in that case that the crime of murder had been committed in Italy by the accused, behind German lines at a time when Italy was an ally of the United States. The Extradition Court deciding *In Re LoDolce*, 106 F. Supp. 455 (W.D.N.Y., 1952) ruled that since Italy did not then control the sovereign territory where the crime was committed, the Treaty between the United States and the Republic of Italy *could not* be extended to permit extradition. *LoDolce id.* at 460. In all cases cited in *LoDolce,* the requesting state's lack of territorial jurisdiction at the time of the alleged criminal acts was outcome determinative on the issue of jurisdiction to adjudicate and punish those acts. Universality was never considered by the Extradition Court as a basis for jurisdiction in that case.

The Extradition Court stated that to exclude war crimes and genocide from a "fair interpretation" of the provision of the Convention on Extradition would restrict Israel's rights under the Treaty, which is disfavored. *Accord Factor,* 290 U.S. at 294. The Court also concluded that the surrender of the accused in this case would not impair "any legitimate public or private interest". *Demjanjuk, id.* at 563. The District Court did not discuss the municipal and international law consequences of holding that the United States is obligated to recognize any foreign state's assertion of territorial or extraterritorial jurisdiction to try any United States citizen before its municipal tribunals based upon that state's charge under an existing extradition treaty of one of the "universal crimes" for which petitioner-appellant was found extraditable.

The District Court's citation of *Valentine, supra* to justify the Court's liberal interpretation of the treaty and *Raiche, supra* as precedent for the finding that petitioner-appellant was accused of a "very serious charge" that should be provided for in the Treaty, are wholly inapposite in this case. Nor do the other cases cited by the District Court provide persuasive support for the Court's decision that a civilian court of extradition is competent to recognize war crimes and genocidal conduct as international crimes, universally punishable by all nations and that these attempted judicial codifications of international law by the Extradition Court are a part of United States law. *Paquete Habana, supra.*

A. Applicability of dual criminality principle

The District Court, in its extradition opinion and later its habeas decision, held that the common law rule of "dual criminality" is inapplicable in the instant case and, therefore, does not act as a bar to extradition, *In Re Demjanjuk, supra,* 612 F. Supp. at 569.

This Court long ago settled the rule that ". . . an offense is extraditable only if the *acts charged* (*emphasis added*) are criminal by the laws of both *countries*". *Collins v. Loisel, supra,* 259 U.S. at 309. The *Branch* court went further when it stated, "the requirement that the acts alleged be criminal in both jurisdictions is central to extradition law. . . .". *Branch v. Raiche,* 618 F.2d at 847.

The extradition and habeas court opinions acknowledge that the rule of dual criminality is absent in this case but in both decisions, the Court ruled that its interpretation of the language of the Convention on Extradition supercedes the rule of law or makes it inapplicable. In other words, the law of the land, is asserted not to be the law of the case.

In support of this ruling of first impression, the Court turns to the *Assarsson* precedent *In the Matter of Assarsson,* 635 F.2d 1237 (7th Cir., 1980). In that case, an extradition court issued a certificate of extraditability when one of the multiple offenses (arson in . :mark) charged by the requesting state was committed outside Swedish territory and as such could possibly have been non-prosecutable under United States Law because the United States does not punish extraterritorial crimes except in limited circumstances. Jurisdiction over the accused and the majority of offenses charged in *Assarsson* was rooted deeply in traditional territorial and "active personality" principles rendering its application wholly inapposite to the case at bar and unsupportive of the extradition's court's ruling that double criminality is inapplicable in this extradition proceeding.

Notwithstanding the lack of support for its holding, the court completes its circular logic by ruling that because the offenses or *acts* charged by Israel in its arrest warrant (complaint) are not prosecutable in the United States and because these offenses are nonetheless found by the Court, via the expedient of the *inter alia* murder charge contained in the Government's Complaint, to fall within enumerated treaty offenses, then this interpretation of the language of the treaty makes the "dual criminality" rule inapplicable. *Demjanjuk, supra,* 612 F. Supp. at 569.

This ruling flies in the face of the law which states "that an offense is extraditable only if the *acts charged* (*emphasis added*) are criminal by the laws of both countries". *Collins v. Loisel, supra; Accord, Branch v. Raiche, supra, Caplan v. Vokes,* 649 F.2d 1336, 1343 (7th Cir. 1981) (". . . no offense is extraditable unless it is criminal in both jurisdictions"). Thus, our courts have stated em-

phatically and repeatedly that: (1) the acts alleged by the requesting state to be extraditable must be criminal in both jurisdictions and (2) this determination can be made only on the basis of the asylum state's (United States) law. This strict requirement of U.S. law has not been met in this case, thereby establishing an independent bar to petitioner-appellant's extradition which cannot be lifted by the ruling of the District Court that the principle of dual criminality is "inapplicable".

The Extradition Court ruled that the test of dual criminality was "inapplicable" to the case at bar. In so doing the Extradition Court failed to meet the dual criminality requirement, having never found the dual criminality necessary under 18 U.S.C. Section 3184 and the Treaty in order to certify petitioner's extraditability. Failing in this task, the Extradition Court caused petitioner-appellant to be unlawfully restrained of his liberty. The Habeas and Circuit Courts, by applying the same logic to avoid this issue, have permitted this unlawful restraint to continue.

B. The ex post facto nature of Israel's Municipal Nazi Law establishes an independent bar to extradition under United States Law.

The Constitution of the United States prohibits the enactment by Congress or state legislatures of an *ex post facto* law in Article I, Section 9, Cl. 3; Section 10, Cl. 1. An *ex post facto* law is one that "punishes, as a crime, an act done before its passage, and when, when committed, was not punishable", *Calder v. Bull*, 3 U S. (3 Wall.) 386, 390 (1798). *See Ex Parte Garland*, 71 U.S. 333, 18 L. Ed. 366 (1866); *cf. Ross v. Oregon*, 227 U.S. 150, 33 S. Ct. 220, 51 L. Ed. 458 (1912); *Frank v. Mangum*, 237 U.S. 309, 59 L. Ed. 969 (1915). Judicial interpretations of Article I, Section 9 and Section 10 United States Constitution have not tempered or limited the prohibition.

This prohibition bars the taking of jurisdiction over the crimes as alleged under the municipal law of the State of Israel for two (2) reasons: (1) such jurisdiction would be asserted where the acts alleged by Israel's complaint are not deemed adjudicatable under current United States Law (ratification of the U.N. Convention on Genocide is still pending), and (2) such extraterritorial criminal jurisdiction would be unconstitutional, because it would recognize that Congress has the power to enact an *ex post facto* law—a power that is expressly denied Congress under the Constitution of the United States.

The sovereign State of Israel came into existence in 1948. Israel's municipal Nazi (Punishment) Law was passed by its Knesset in 1950. Israel has no extraterritorial jurisdiction over acts committed during the National Socialist Regime because at the time of their commission, Israel did not exist as a sovereign state. 15 U.N. SCOR Supp. (April-June 1960) at 35, U.N. Doc. S/4349 (1960).

C. The principles of "dual criminality" and "specialty"

The Court concedes that the dual criminality principle makes an offense non-extraditable unless it is punishable in both the requesting and the requested states' jurisdictions. *Demjanjuk, id.* at 563. Unable to overcome the force of Article V of the Treaty or the principle of dual criminality, the Court merely rules that the treaty provision and the dual criminality principle are both "inapplicable" in this case. *Demjanjuk, id.* at 569.

In conclusion, the Extradition Court never clearly stated the standard applied to probable cause. Such an omission in its analysis demonstrated the unlawfulness of petitioner's restraint of liberty. The reviewing *Habeas*

Corpus Courts in like manner failed to state the probable cause standard applied, thereby, continuing petitioner's unlawful restraint of his liberty, both in the District and Circuit Courts.

IV. The District Court Ruled in Error That There Was Evidence Sufficient to Establish the Identity of "Ivan Grozny" and to Establish Probable Cause for the Commission of the Alleged War Crimes and Genocidal Act in Israel's Complaint by the Petitioner-Appellant

As noted, the District Court, on February 21, 1985 ordered that it would take jurisdiction to hear evidence on Israel's Complaint (Warrant of Arrest). The Complaint charged the offenses of *inter alia*, war crimes, crimes against humanity, crimes against the Jewish people and crimes against persecuted people, committed against these groups in Poland during 1942-43. See A138. The Court ruled that the specified crimes, amounting to group murder, and the acts of murder defined by the Israeli law as war crimes were offenses for which the accused could be extradited under Article III of the Convention on Extradition between the United States and Israel. *Demjanjuk, id.* at 559-62.

The definition of the crimes charged and the application of procedures to punish these crimes contained in the Israeli Nazi (Punishment) Law of 1950 was also deemed by the Court to conform to United States Law because Israel's municipal statute conformed to the Extradition Court's interpretation of the law of nations. *Demjanjuk, id.* at 554.

The District Court stated the rule regarding the burden of proof for identification in this case when it held

that once the extradition warrant was issued, it must be regarded as "presumptively right", thus shifting the burden of overcoming the presumption to the accused *Demjanjuk, id.* at 564. The Court rested this ruling on the holding in *Raftery ex rel. Fong v. Bligh*, 55 F. 2d 189 (1st Cir. 1932), an interstate extradition matter. *Demjanjuk, id.* at 548.

The Court then found that the Israeli Complaint (Extradition Request) had been properly certified by an appropriate United States diplomat and thus the evidence contained therein was immune from evidentiary challenge apart from allegations of non-compliance with the procedural certification requirements of 18 U.S.C. Section 3190 and the requirements as to the form of the Request for Extradition, pursuant to Article X of the U.S.-Israel Convention on Extradition. The Court subsequently ruled that the diplomatic procedures and requirements had been met in the case. *Demjanjuk, id.*

The evidentiary "Nexus" identifying John Demjanjuk as "Ivan Grozny" was then examined by the Court. The Israeli Request for Extradition (Government Exhibit 1) was judged to be "the Complaint" for identification purposes, *Demjanjuk, id.* at 549. In the section of the Request entitled "Identification of Demjanjuk", the Israeli charging document lists the identifications made by four (4) Israeli survivors. Israeli police investigators had shown these four (4) survivor witnesses a single photograph marked with a letter "A" and transcriptions of their prior testimony at petitioner-appellant's 1981 denaturalization hearing. The witnesses then uniformly stated that the picture shown to them was that of the man remembered as "Ivan Grozny" from Treblinka and was the same picture they had identified during their testimony before the District Court in 1981. *Demjanjuk, id.* at 550-52.

Rather than address the threshold issue of subject-matter jurisdiction, or the central, consequent issues of treaty interpretation or even probable cause, the extradition magistrate first considered the accused's "identity". *Demjanjuk, id.* at 547-54. For this reason the Court assembled the identification evidence supplied in Israel's Request for Extradition, applying every available procedural restriction to the review of petitioner-appellant's evidence which demonstrated the mistaken identity in the case, occasioned originally by the Soviet-supplied identification evidence (Trawniki I.D. Card). *Demjanjuk, id.* at 552-54, 564, 566, 569.

The Extradition Court after reviewing this evidence ruled that the affidavits of the four (4) witnesses who testified before him at the 1981 denaturalization hearing sustained the government's burden that John Demjanjuk is the man whose extradition is sought by Israel. *Demjanjuk, id.* at 552.

A. Probable cause

The determination of the standard for weight and sufficiency of evidence required to establish probable cause to believe the accused committed the war crimes/genocidal acts alleged by Israel is held by the Court to be "for the determination of the committing Court", based on "reasonable grounds to believe the accused guilty". *Demjanjuk, id.* at 563.

To arrive at its judgment, the Extradition Court notes that the record contains the affidavits of three (3) Israeli's citizens, two of whom testified before the District Court during petitioner's 1981 denaturalization hearing. The Court describes its function as a limited trier of fact measuring the charges against the weight and sufficiency of

these affidavits to *identify* those criminal *acts* allegedly committed by the accused and determining whether these *acts* constitute the extraditable offense charged in the government's complaint. *Demjanjuk, id.* at 564.

The Court refers to the precedent set in *Shapiro v. Ferrandina,* 478 F.2d 894, *cert. dism'd,* 414 U.S. 884 (1973). Some of the charges in the *Shapiro* case had no cognates under U.S. (N.Y. State) Law and some of the acts alleged were not punishable under U.S. law and thus not extradictable under the dual criminality and specialty requirements. *Shapiro, id.* at 907-08. The Extradition Court acknowledged that a finding of extradictability of *separate charged offenses* is a procedural requirement under *Shapiro. Demjanjuk, id.* at 564.

The Court previously concluded that the weight and sufficiency of the evidence provided by the 1983 affidavits of four (4) Treblinka survivors (Rosenberg, Epstein, Lewkowicz and Czarny) confirming the testimony of three (3) of them during petitioner's 1981 denaturalization hearing regarding the acts and petitioner's identity.

The Court then ruled on the evidence of the *acts* which the petitioner allegedly committed while "at the site and at the time" and whether these acts constituted the extraditable offense of *murder.*

The Court first draws upon the 1981 denaturalization hearing testimony of Elijah Rosenberg, read into the record of the March 12, 1985 extradition proceedings by the government. When Mr. Rosenberg had the opportunity to identify respondent at the petitioner's 1981 denaturalization hearing, he did not do so, nor did witnesses Lewkowicz or Epstein. Joseph Czarny did not testify during the denaturalization hearing.

The Court combined this evidence with Joseph Czarny's 1976 affidavit in Israel. Mr. Czarny's statement was also read into the record of the extradition hearing by the government. Mr. Czarny stated here that he had worked in another camp and recounted statements of other Jewish victims he recalled regarding "Ivan Grozny's" crimes at the Treblinka death chambers. The Extradition Court ruled that Mr. Czarny "saw respondent at Treblinka convey(ing) people (sic) into the gas chambers", *Demjanjuk, id.* at 566.

Ruling on probable cause, the Extradition Court found:

> "It is enough in this case, after examining the statements of just three (3) witnesses, to conclude that there is sufficient evidence to find probable cause that respondent, while serving as a guard at the Treblinka camp in 1942-43, committed murders of: uncounted numbers of prisoners . . . who died of asphyxiation in the gas chambers which respondent operated . . .". *Demjanjuk, id.*

The Court thus ruled that based on the evidence provided in these affidavits, the factual and legal Nexus has been established between the *acts* alleged in the Israeli Complaint (Arrest Warrant) and the *offenses* or *crimes* charged under the Municipal Nazi (Punishment) Law of Israel, namely multiple acts of murder amounting to: crimes against humanity, crimes against the Jewish people and crimes against persecuted people. This "legal Nexus" constituted the finding of probable cause by the Extradition Court.

The Court then examined two (2) supplemental affidavits obtained from witness Rosenberg several months after the Request for Extradition issued. The affidavit dated February 5, 1984 recounted an assault by "Ivan

Grozny" on Mr. Rosenberg's cousin, David Auslander. The denaturalization record is silent as to this assault.

When this affidavit was made, Mr. Rosenberg, at the inquiry of the Israeli police, identified a photograph marked "ER/1" with: "I hereby confirm that this is a picture of *John Demjanjuk,* whom the State of Israel wishes to extradite and bring to trial for the deeds he committed in the years 1942 and 1943 at the Treblinka death camp". In its opinion, the District Court ruled that the photograph marked "ER/1" is *a "circa 1982"* photograph of *John Demjanjuk.* No evidence of record supports the Court's fact-finding. The Extradition Court relied heavily upon Mr. Rosenberg, as it had done before. Mr. Rosenberg by a 1948 affidavit stated that the "Ivan" at the gas chambers was killed by inmates during the heroic Treblinka uprising in August, 1943, *cf.* STEINER, JEAN FRANCOIS TREBLINKA (New York, 1970).

B. Insufficiency of fundamental justice

The hidden danger in this type of case is that a misplaced obective in the Court's ruling that Israel or any other nation may undertake to vindicate the injustices perpetrated during the Nazi era will be confused with the limited objectives of statutory and treaty law in an extradition proceeding.

In *Fedorenko v. United States,* 449 U.S. 490 (1981) Justice Stevens touched upon this very issue in his prophetic dissenting opinion.

> "The gruesome facts recited in the record create what Justice Holmes described as a sort of 'hydraulic pressure' that tends to distort our judgment. Perhaps my refusal to acquiesce in the conclusion reached by highly respected colleagues is attributable in part to

> an overreaction to the pressure. . . . That human suffering will be a consequence of today's venture is certainly predictable; that any suffering will be allayed or avoided is at best doubtful."

The District Court dismissed as non-probative the substantial evidence exonerating the accused. On a consolidated appeal of the judgment and these denials, the Seventh Circuit Court of Appeals agreed to review the evidence heard by the District Court and reversed, restoring Frank Walus' citizenship. *United States v. Walus,* 453 F. Supp. 699 (N.D. Ill. 1978), *rev'd on other grounds,* 616 F.2d 283 (7th Cir., 1980).

Justice Douglas in a different time but in a parallel context, addressed the dangers of acquiescing in the abrogation of procedural protection and in a hearing of this nature when he ruled that:

> "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men. . . . It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice." *Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 177, 179 (1951), (Douglas, J, conc.)

The procedural infirmities that may arise in a probable cause hearing of this kind are apparent. Given that which is at stake, when passions arise from the horrors recalled, individuals' rights may be subordinated to an occasion for recounting the inconceivable crimes of National Socialism. The Courts, however, cannot subordinate constitutional protections to the teaching of this horrible history.

CONCLUSION

For the above-stated reasons, petitioner respectfully requests that this Court grant the writ of certiorari for which he here applies.

Respectfully submitted,

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*The above Petition for Writ of Certiorari includes 2 pages of required Constitutional and applicable Statutes pursuant to Rule 21(.4) thereby complying with page limit.